COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its Own Motion, pursuant to G.L. c. 164 §§ 1A(a), 1B(d), 94 and 220 C.M.R. 11.04 into the Costs that Should Be Included In Default Service Rates for Fitchburg Gas & Electric Light Company	)	**D.T.E. 03-88D**

JOINT RESPONSE OF CENTRICA NORTH AMERICA AND DOMINION RETAIL, INC. TO OPPOSITION OF FITCHBURG GAS AND ELECTRIC LIGHT COMPANY TO PETITIONS TO INTERVENE

I. Procedural Background

On November 17, 2003, consistent with its April 24, 2003 Order in *Procurement of Default Service*, D.T.E. 02-40-B, the Department of Telecommunications and Energy ("Department" or "DTE") opened an investigation regarding the costs that should be included in Default Service rates ("November 17, 2003 Order"). In its November 17, 2003 Order, the Department set forth the types of costs which are to be included in each distribution company's default service rates and directed each distribution company to submit to the Department a filing which (1) identifies its wholesale-related and direct retail-related default service costs; (2) allocates those costs to its default service customer classes on a per kilowatt-hour ("KWH") basis; and (3) calculates adjustments to distribution base rates based on a per-KWH allocation to each rate class of the identified default service costs. D.T.E. 03-88, at 4-5.

On January 20, 2004, Fitchburg Gas and Electric Light Company ("Fitchburg") submitted a filing to the Department as required by the November 17, 2003 Order. The investigation of Fitchburg's default service filing has been docketed at D.T.E. 03-88D.

On February 17, 2004, the Department issued a Notice with respect to WMECo's filing in D.T.E. 03-88D and established separate deadlines for petitions to intervene and written comments. Both Centrica and Dominion filed petitions to intervene in this proceeding (hereinafter "Centrica Petition" and "Dominion Petition").

At a March 11, 2004 procedural conference in this proceeding (and companion proceedings regarding other distribution companies' default service costs filings), the Hearing Officer established March 19, 2004 as the deadline for distribution companies to submit written opposition to certain petitions to intervene, and March 24, 2004 as the deadline for responses to these oppositions.

On March 18, 2004, Fitchburg filed with the Department its Opposition to the petitions to intervene of Centrica and Dominion ("Fitchburg Opposition"). Consistent with the procedural schedule established by the Hearing Officer, Centrica and Dominion herewith file a joint response to the Fitchburg Opposition.

II. Both Centrica and Dominion Meet the Requirements for Intervention as Set Forth in G.L. c. 30A, § 10(4) and 220 CMR 1.03(1)(b).

As required by G.L. c. 30A, §10(4) and 220 CMR 1.03(1)(b), both Centrica and Dominion have demonstrated that they "may be substantially and specifically affected" by these proceedings. Centrica has stated that it is a large retail supplier that is interested in participating in the Massachusetts retail electricity market, and, as such, would be affected by the allocation of costs between distribution rates and default service rates. Centrica Petition at 3.

Similarly, Dominion has stated that it presently serves customers in the Massachusetts electricity market and that it has an interest in "ensuring that Default Service rates are properly calculated…" Dominion Petition at 1.

Notably, in its Opposition Fitchburg never states that either Centrica or Dominion is not or will not be substantially and specifically affected by these proceedings. In fact, Fitchburg presents only three general arguments[1] in opposition to the Centrica Petition and Dominion Petition – (1) that the commercial interests raised by these petitions do not qualify for full party intervention; (2) that the scope of this proceeding is narrow; and (3) that Centrica and Dominion "have identified as interests that may be substantially and specifically affected by these proceedings matters which have previously been decided by the Department." Fitchburg Opposition at 1.

Fitchburg's focus on general arguments cannot disguise a simple and inescapable fact – that the default service rate established by the Department in this case will constitute the "price to beat" for Centrica, Dominion and other suppliers. How this rate is set and whether it is set accurately is of substantial interest to Centrica and Dominion and will affect these companies' operations in the Massachusetts electricity marketplace over coming months.

Despite Fitchburg's arguments that the scope of this proceeding is narrow and that the Department previously has decided issues which substantially and specifically affect Centrica

[1] In its Opposition, Fitchburg states that it "adopts and incorporates by reference herein with respect to the petitions of Centrica and Dominion the arguments and objections it raised during the March 11 hearing with respect to Select Energy, Inc. and Constellation NewEnergy, Inc." Fitchburg Opposition at 1 (abbreviations omitted). It is not acceptable for Fitchburg to incorporate by reference statements made at a procedural conference relative to other entities' petitions to intervene. On March 11, 2004, the Hearing Officer established a schedule for written responses to the Centrica Petition and the Dominion Petition. If Fitchburg was interested in opposing these petitions, it was required to respond in writing to the specifics of the Centrica Petition and Dominion Petition. At this point, the Hearing Officer should only consider the March 18, 2004 Fitchburg Opposition and not the statements made by Mr. Epler at the procedural conference.

and Dominion, one issue that clearly will be decided in this case is the allocation of default service costs to default service rates.

Both the Centrica Petition and the Dominion Petition indicate an interest in accurately establishing this electricity "price to beat". Specifically, Centrica has stated that "[T]he allocation of costs between distribution rates and the default price is certainly a key regulatory feature of the market and, in that respect, Centrica and its ability to enter and compete in the Massachusetts market may be substantially and specifically affected by these proceedings." Centrica Petition at 3. Similarly, Centrica has made clear that it is interested in ensuring that the default service rate is properly calculated and that correct price signals are sent to the marketplace. Dominion Petition at 1-2.

In fact, it is difficult to understand how Centrica or Dominion could have been more clear or more precise regarding its interest in this proceeding and why it is substantially and specifically affected by this proceeding. In this proceeding, the Department will establish the electricity "price to beat" for Fitchburg default service customers. Making sure that rate is calculated properly is of paramount importance to both of these suppliers.

III. The Department Should Not Use Its Discretion Relative to Petitions to Intervene to Exclude Centrica and Dominion from this Proceeding.

Although the Fitchburg Opposition includes no support for its argument that intervention should be denied here because Centrica and Dominion only have a commercial interest in this proceeding, Centrica and Dominion nonetheless offer the following response to Fitchburg's general position.

While the Supreme Judicial Court (1) has concluded that agencies have broad discretion to grant or deny intervention (*Tofias v. Energy Facilities Siting Board*, 435 Mass. 340 (2001)

("*Tofias*")), and (2) has upheld the decision of the Department to deny intervenor status to a competitor with an economic interest in a proceeding (*Cablevision v. Department of Telecommunications and Energy*, 428 Mass. 436 (1998) ("*Cablevision*")), these cases do not support the denial of petitions to intervene by suppliers who compete in the very industry which is the subject of this proceeding and who will compete against the very rates which will be established in this case.

Unlike the petitioners seeking to intervene in *Tofias* and *Cablevision*, both Centrica and Dominion seek to intervene here because they are (or seek to be) competitors in the Massachusetts retail electricity market. Of course, there is no logical basis for excluding electricity suppliers from a proceeding in which the electricity "price to beat" will be established. The Supreme Judicial Court in *Cablevision* recognized the profound difference between intervention by competitors in another industry and intervention by competitors in the industry that is the subject of the proceeding:

> The department has not considered inter-industry competition to be a relevant factor in evaluating the public interest under G.L. c. 164, § 96. *In various circumstances, intra-industry competitors have had standing to challenge agency action that allegedly caused them harm.* See Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 295-296, 367 N.E.2d 796 (1977); Everett Town Taxi, Inc. v. Aldermen of Everett, 366 Mass. 534, 538-539, 320 N.E.2d 896 (1974); South Shore Nat'l Bank v. Board of Bank Incorporation, 351 Mass. 363, 367-368, 220 N.E.2d 899 (1966); A.B. & C. Motor Transp. Co. v. Department of Pub. Utils., 327 Mass. 550, 551, 100 N.E.2d 560 (1951). *There is, however, no parallel inter-industry authority that supports standing.* Our cases have recognized that the department's task, assigned by the Legislature, is the "protection of ratepayers." See Commonwealth Elec. Co. v. Department of Pub. Utils., 397 Mass. 361, 369, 491 N.E.2d 1035 (1986), cert. denied, 481 U.S. 1036, 107 S.Ct. 1971, 95 L.Ed.2d 812 (1987), and cases cited.

Cablevision at 438 (emphasis added).

In essence, Fitchburg attempts here to create a closed adjudicatory circle where only ratepayers can question a distribution company's data or examine its calculations. In Fitchburg's perfect world, competitive suppliers could be no more than helpless bystanders, unable to test or question the very rates and charges which could "make or break" them. Such a vision would be untenable with respect to any proceeding in which electricity rates are to be set, but it is particularly inappropriate in the case of a default service rate proceeding which grows out of an earlier proceeding, D.T.E. 02-80, in which the Department took steps to allow for more meaningful competition in the retail electricity market.

Certainly, the Department has not opted to exclude intra-industry competitors from gas or telecommunications rate proceedings. In proceedings regarding gas rates, the Department has granted intervenor status to gas marketers. *See* Bay State Gas Company, D.T.E. 01-81 (December 4, 2002); Bay State Gas Company, D.P.U. 95-104 (1995); Fall River Gas Company, D.P.U. 96-60 (1996); Boston Gas Company, D.P.U. 96-50 (Phase I) (1996); Commonwealth Gas Company, DPU 95-102 (December 22, 1995). Similarly, competitive local exchange companies have been allowed to intervene in proceedings regarding Verizon customer rates. *See* New England Telephone and Telegraph d/b/a NYNEX, D.P.U. 96-68 (1997); New England Telephone and Telegraph d/b/a NYNEX, D.P.U. 94-50 (1995).

In the end, any decision to deny intervention to competitive suppliers in a proceeding where the electricity "price to beat" will be established would be both extraordinary and unnecessary. First, neither case law nor Department precedent supports the denial of intervention to a potential intervenor that is substantially and specifically affected by the rates being set in the industry in which the potential intervenor operates. Second, it would be particularly appropriate for the Department to use its discretion to deny intervention in an intra-industry context in a case

which springs from a prior proceeding which was predicated on the Department's interest in allowing for more meaningful competition in the restructured electricity industry.

CONCLUSION

For the foregoing reasons, Centrica and Dominion respectfully request that the Department grant their petitions to intervene and accord them full party status in this case.

Respectfully submitted,

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